IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1339 OF 2007
IN
SUIT NO.1052 OF 2007

Bhanu Vijay Gandhi & Ors. ..Plaintiffs.

V/s.

S.M.Builders & Anr. ..Defendants.

And

Golden Acres Co-operative Housing Society Limited. ..Respondents.

WITH

NOTICE OF MOTION NO.2005 OF 2007
WITH
NOTICE OF MOTION NO.2311 OF 2007
WITH
NOTICE OF MOTION NO.3061 OF 2007
IN
SUIT NO.1451 OF 2007

Shri Sushil Gupta HUF & Ors. ..Plaintiffs.

V/s.

Bhanu Vijay Gandhi & Ors. ..Defendants.

Mr.Arif Bookwala,Sr.Advocate a/w. Mr.Snehal Shah a/w. Ms.M. Shah i/b. Pandya Gandhi & Co. for Plaintiffs.

Mr.Kevic Setalvad a/w Mrs. Toral Shah i/b. Tyabji Dayabhai for Defendant Nos. 1 to 4.

Ms.Rajni Iyer, Sr.Advocate a/w Mr.Rajesh Mishra for Defendant No.5.

CORAM: A.M.KHANWILKAR,J
DATE : DECEMBER 11, 2007.

P.C. :

1. By this common order, the aforesaid four Motions are being disposed of together.

2. The description of the suit property, common to both the suits, is, Plot No.1 admeasuring 1000 square yards approximately equivalent to 836.2 square meters with bungalow No.18 known as Gurukripa, situated at Juhu, Mumbai, which is a part of larger part of plot comprising of Plot Nos. 1 to 17 forming part of Ruia Park Estates, situated at Juhu, Mumbai(Property "A").

3. The larger property (Property-A) was acquired by one S.M Builders from the original owners M/s.Ramnarain & Sons Private Ltd. Thereafter, the said property-A was divided into property-B and property-C to construct two bungalow type colonies on ownership basis. Property-B comprises of "Golden Beach Bungalows Scheme"; whereas property-C comprises of "Golden Acres Bungalows Scheme". For the present, we are concerned with the suit property, which is a part of property-C falling under "Golden Acres Bungalows Scheme".

4. The Gandhis have filed Suit before this Court being Suit No. 1052 of 2007 asserting that they are

the absolute owners of the suit property. It is their case that on account of conveyance in their favour in relation to the suit property, they have acquired absolute right therein, which admeasures about 1000 sq.yards. It is their case that they were the absolute owners not only of the plot No.1, but also bungalow standing thereon being Bungalow No.18, with further right to the unutilised FSI admeasuring 2604 sq.ft.. According to the Gandhis, as they were the absolute owners and in possession of the suit property pursuant to conveyance, that property could not be transferred and conveyed to Golden Acres Cooperative Housing Society Ltd. by their predecessor S.M. Builders. On this assertion Gandhis filed Suit against S.M.Builders in this Court for the following relief.

> "(a) this Hon'ble Court be pleased to declare that the Plaintiffs are the owners of the Suit Plot (which is more particularly described in Exhibit A to the Plaint) and are entitled to exclusive and unrestricted possession and occupation thereof;
>
> (b) this Hon'ble Court be pleased to declare that the Defendants have no right, title or interest to the Suit Plot (which is more particularly described in Exhibit A to the Plaint), or any part thereof, and that the Defendants have no right or power to deal with, transfer, convey or execute any documents or conveyance in respect thereof, either pursuant to the undertaking recorded in the Order dated 13th March, 2007(being

Exhibit M to the Plaint), or in any manner howsoever.

(c) this Hon'ble Court be pleased to pass an order of permanent injunction to restrain the Defendants by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendants from in any manner transferring, conveying, dealing with, entering upon and/or executing any deed or conveyance or any document in respect of the Suit Plot (which is more particularly described in Exhibit A to the Plaint), or any part thereof;

(d) pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to pass an order of temporary injunction to restrain the Defendants by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendants from in any manner transferring, conveying, dealing with, entering upon and/or executing any deed or conveyance or any document in respect of the Suit Plot (which is more particularly described in Exhibit A to the Plaint), or any part thereof either pursuant to the undertaking recorded in the Order dated 13th March, 2007 (being Exhibit M to the Plaint), or in any manner howsoever;

(e) For interim and ad-interim reliefs in terms of prayer (d) hereinabove;

(f) For costs;

(g) For such further and other reliefs as the nature and circumstances of the case may require."

In the same suit Gandhis took out Notice of Motion No.1339 of 2007 praying for interim reliefs during the pendency of the Suit, which read thus:

"(a) That pending the hearing and final disposal of the Suit, this Hon'ble Court be

> pleased to pass an order of temporary injunction to restrain the Defendants by themselves or through their servants and agents and/or through any person acting for or on behalf of the Defendants from in any manner transferring, conveying, deal with, entering upon and/or executing any deed or conveyance or any document in respect of the Suit Plot (which is more particularly described in Exhibit A to the Plaint), or any part thereof either pursuant to the undertaking recorded in the Order dated 13th March, 2007 (being Exhibit M to the Plaint), or in any manner howsoever;
>
> (b) For ad-interim reliefs in terms of prayer (a) above;
>
> (c) That the costs of this Notice of Motion be provided for;
>
> (d) For such further and other reliefs as the nature and circumstances of the case may require."

5. For the nature of reliefs prayed by the Gandhis, it was thought appropriate to require them to implead the Society atleast in the said Motion, so that Golden Acres Co-op. Hsg.Socy. Ltd. can be heard on relevant aspects as the proposed relief was to inevitably affect that Society. Consequent thereto, Gandhis have impleaded the Society as Respondent in the Notice of Motion only. This Court after considering rival submissions, by order dated 12th April, 2007 granted ad-interim relief in favour of Gandhis in terms of prayer clause (a) of their Motion.

6. It appears that, after the said ad-interim order was passed, Gandhis entered into an Indenture of conveyance (registered), conveying the suit property to M/s. Blue Estate Private Ltd. (hereinafter referred to as Blue Estate) for a sum of Rs. 3,75,00,000/-(Rupees Three Crores Seventy Five Lakhs only), on 19th April, 2007. For that reason, the second suit being Suit No.1451 of 2007, has been filed by Guptas in this Court on the assertion that there was a prior valid and subsisting agreement in their favour, executed by Gandhis in relation to the suit property on 29th February, 2000. According to the Guptas therefore, Gandhis could not have dealt with the suit property, much less conveyed the same to M/s.Blue Estate. It is on this assertion Guptas in their Suit have asked for reliefs including to declare that the sale of the suit property in favour of the Blue Estate by Gandhis was liable to be set aside. Relief claimed in the suit filed by Guptas against Gandhis and Blue Estate, read thus:

> "(a) that this Hon'ble Court be pleased to declare that the said Agreement dated 29th February 2000 Exhibit "B" to the plaint is valid, subsisting and binding;
>
> (b) that this Hon'ble Court be pleased to order and decree the Defendants to

specifically perform the said Agreement dated 29th February, 2000 Exhibit "B" to the Plaint and for such purpose the Defendants be directed to do all such acts, deeds and things including but not limited to executing the Conveyance in favour of the Plaintiffs and putting the said Plaintiffs in possession of the said property more particularly described in the Exhibit "A" to the Plaint;

(c) that this Hon'ble Court be pleased to declare that purported sale by Defendants Nos. 1 to 4 in favour of Defendant No.5 is illegal and that the same is liable to be and be set aside.

(d) that in the event of this Hon'ble Court coming to the conclusion that the Plaintiffs are not entitled to a decree of specific performance, then and in that event the Defendants be ordered and decreed to pay to the Plaintiffs (i) a sum of Rs.79,00,000/- (Rupees Seventy Nine Lacs only) as per Particulars of Claim Exhibit "T" hereto together with further interest thereon on the said sum of Rs.34,50,000/- at the rate of 18% p.a. from 25th April, 2007 till payment or realization (ii) a sum of Rs.23,70,00,000/-(Rupees Twenty Three Crores Seventy Lacs only) as and by way of damages as per Particulars of Claim Exhibit "U" hereto with interest thereon at the rate of 18% p.a. from the date of the suit till payment and/or realization;

(e) that this Hon'ble Court be pleased to declare that the repayment by the Defendants Nos. 1 to 4 of the said sum of Rs.79,00,000/-(Rupees Seventy Nine Lacs only) and further interest and costs of the suit is secured by a statutory charge on the said property at Exhibit 'A' to the Plaint and that the same be sold by and under the direction of this Hon'ble Court and the net sale proceeds thereof be appropriated towards the Plaintiffs Claim as per particular referred to hereinabove;

(f) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver, High

Court, Bombay or any other fit or proper person as the Receiver of the said property described in Exhibit 'A' to the Plaint with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908;

(g) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the Defendants, their servants and/or agents by an order of injunction from selling, alienating, encumbering, transferring, developing, creating third party rights in respect of or parting with possession of the said property described in Exhibit 'A' to the Plaint;

(h) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain Defendants Nos. 1 to 4 from taking any further steps in pursuance of the alleged sale in favour of Defendants No.5 including handing over possession of the said property to Defendant No.5.

(i) for interim and ad-interim reliefs in terms of prayers (f) to (h) above;

(j) for the costs of the suit;

(k) for such further and other reliefs as the nature and circumstances of the case may require;"

During the pendency of the said Suit filed by Guptas, they have taken out Notice of Motion No.2005 of 2007 for interim injunction praying for the following reliefs:

"(a) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay or any other fit and proper person as the Receiver of the said property

described in Exhibit 'A' to the Plaint with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908;

(b) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the Defendants, their servants and/or agents by an order of injunction from selling, alienating, encumbering, transferring, developing, creating third party rights in respect of or parting with possession of the said property described in Exhibit 'A' to the Plaint;

(c) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain Defendants Nos. 1 to 4 from taking any further steps in pursuance of the alleged sale in favour of Defendants No.5 including handing over possession of the said property to Defendant No.5.

(d) for interim and ad-interim reliefs in terms of prayers (a) to (c) above;

(e) for the costs of the Notice of Motion;

(f) for such further and other reliefs as the nature and circumstances of the case may require;"

7. The said Notice of Motion filed by Guptas was considered for grant of ad-interim relief on April 27, 2007, when Counsel appearing for Blue Estate made a statement that the said party would not create third party interest or part with the possession of the suit property and also maintain status quo thereof as on that day till the hearing of the Notice of Motion. It is on that assurance the Court went on to record that it is not necessary to pass any order

for ad-interim reliefs, as prayed. It is seen that Guptas later on filed Notice of Motion No.2311 of 2007 in the same Suit making grievance that the said Blue Estate had willfully breached the solemn assurance given to the Court, as recorded on the earlier occasion, for which reason ought to be proceeded under Order 39 Rule 2A of C.P.C. In the said Notice of Motion No.2311 of 2007, Guptas have asked for following reliefs:

> "(a) that pending the hearing and final disposal of the suit, it is just, necessary and convenient that this Hon'ble Court be pleased to attach the suit property described in Exhibit "A" to the Plaint for breach of the order dated 27th April, 2007 under Order XXXIX Rule 2A of the Code of Civil Procedure 1908;
>
> (b) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to detain Defendant No.5 in Civil Prison for breach of the order dated 27th April, 2007 under Order XXXIX Rule 2A of Code of Civil Procedure 1908;
>
> (c) for interim and ad-interim reliefs in terms of prayers (a) and (b) above;
>
> (d) for the costs of the Notice of Motion;
>
> (e) for such further and other reliefs as the nature and circumstances of the case may require;"

8. The said Blue Estate on the other hand, have taken out Notice of Motion No.3061 of 2007 on the

assertion that they have not committed any breach in relation to the assurance given to the Court on their behalf. According to them, the work which was continued in the bungalow was of repair and renovation of the bungalow in respect whereof no statement was made on their behalf. According to Blue Estate, statement made on their behalf to the Court was in the context of reliefs claimed by Guptas in the Notice of Motion, which in no way prohibit repair and renovation work of the bungalow. It is the case of Blue Estate that even if the reliefs as prayed by Guptas in their former Motion were to be granted as it is, it would not have precluded Blue Estate from carrying on repair and maintenance work of the bungalow whereof they were admittedly in possession; and could have done so for beneficial enjoyment of the bungalow. On this basis Blue Estate in the Motion taken out by them have asked for the following reliefs;

> "(a) That pending the hearing and final disposal of this suit, this Hon'ble Court may be pleased to clarify and /or alter the Order of status quo granted on 27.4.2007 and 1.6.2007 so as to enable the Defendant No.5 to carry out suitable tenantable repairs, renovations, decorations in the bungalow namely "Gurukripa" in the suit property on such terms and conditions as this Hon'ble court shall deem fit and proper.

(b) That pending the hearing and disposal of this Notice of Motion, ad-interim relief permitting protective enclosure of the standing structure with plastic/tarpaulin be permitted.

(c) That costs of this Notice of Motion be provided for.

(d) For such other relief as this Hon'ble Court may deem fit, proper and necessary in the facts of the case."

9. As aforesaid, Gandhis have approached this Court praying for declaration in respect of the suit property that they have absolute right in Plot No.1 admeasuring 1000 sq.yards alongwith bungalow No.18 standing thereon known as "Gurukripa" situated at Juhu, Mumbai, including the unutilised FSI 2604 sq.ft in respect of the suit plot. That claim is founded on the registered Indenture of Conveyance executed in favour of Gandhis on 8th February, 1994 by their predecessor in title M/s. Mira Janak Trust. It is the case of the Gandhis that after the registered Conveyance, their names have been entered as owners of the suit property in the Index II and Property card and that since then Gandhis are paying property tax, municipal and other charges in respect of the suit property. It is the case of Gandhis that the Golden Acres Cooperative Housing Society Ltd., formed by the purchasers of the plots and bungalows of

property-B and property-C was not entitled for conveyance of the suit property being Plot No.1 from M/s.S.M. Builders, as M/s.S.M. Builders has already transferred the said property in favour of Mira Janak Trust, who in turn has conveyed the same to Gandhis by a registered Conveyance. It is the case of Gandhis that they were entitled to deal with the suit property-Plot No.1 in their own rights and for that reason, Consent Decree between M/s. S.M. Builders and the said Society(Golden Acres Cooperative Housing Society Ltd.) cannot be the basis to convey the Plot No.1 to the Society by M/s. S.M. Builders. It is on this assertion, the relief of declaration and permanent injunction is prayed by Gandhis in the Suit instituted by them.

10. In so far as the Suit instituted by Guptas, it is the case of Gandhis that the claim of Guptas is untenable. In the first place, contends Counsel for Gandhis that the agreement for sale executed in favour of Guptas on 29th February, 2000 stood terminated. For, Guptas had failed to discharge their obligations under the said agreement, which forced the Gandhis to terminate the agreement. Besides, on account of subsequent negotiation between Gandhis and Guptas, the suit agreement for sale was

abandoned and instead fresh terms were agreed upon to convey the suit property to Intel Land Developers Private Ltd. on certain terms and conditions. The said Intel Land Developers Pvt.Ltd. however, has not come forward to claim any relief against Gandhis by way of a substantive suit; and that Guptas are not claiming through Intel Land Developers Private Ltd. so as to pursue the present action. In short, the case of Gandhis is that as there was no subsisting agreement in respect of the suit property between Gandhis and Guptas, they were free to convey the suit property to third party, which in fact has been done on 19th April, 2007 by executing the registered Conveyance in favour of the Blue Estate for consideration of Rs.3,75,00,000/-. The Earnest Money which was deposited by Guptas in terms of agreement for sale dated 29th February, 2000 was returned by them. According to Gandhis, Guptas were never ready and willing to comply with their obligations under the agreement for sale. On this basis Gandhis are opposing for grant of any relief to Guptas.

11. In so far as Blue estate is concerned, according to them, they had reason to believe from the circumstances on record that Gandhis were free to transfer the suit property to third party, as the

agreement for sale in favour of Guptas had already been terminated. In short, stand of Blue Estate is not only to support the stand of Gandhis, but in addition to contend that they are bonafide purchasers of the suit property for consideration, having reason to believe that Gandhis were free to transfer the suit property to third party.

12. In so far as grievance of Guptas that the Blue Estate have committed breach of solemn assurance given to the Court by continuing to repair and renovate the bungalow is concerned, it is the stand of Blue Estate that the assurance of maintaining status quo of the suit property was in the context of the interim relief claimed by Guptas in their Motion in prayer clause (b). In prayer clause (b) of the Motion, the only relief claimed by Guptas was to restrain the Defendants(which includes Blue Estate) from selling, alienating, encumbering, transferring, developing, creating third party rights or part with possession of the suit property. It is the specific case of the Blue Estate that the work undertaken by them and continued after the order dated 27th April, 2007 was only of repair, renovation and decoration of the bungalow. Reliance is placed on the report of the Commissioner as well as the photographs to

support the stand that the work undertaken by Blue Estate was only of repair, renovation and decoration. According to the Blue Estate work of repair, renovation and decoration does not amount to development of the property as such, which alone would have resulted in breach of the assurance given on their behalf to the Court. The Blue Estate, in addition has taken out formal Notice of Motion praying for clarification of the Order dated 27th April, 2007.

13. In so far as Guptas are concerned, it is their case that the agreement for sale executed in their favour dated 29th February, 2000 in respect of the suit property was still valid and subsisting. The Guptas have relied on circumstances to buttress their above stand and would contend that they were entitled for a relief of specific performance. According to Guptas, as their agreement for sale was valid and subsisting, Gandhis had no right to convey the property in favour of the third party(Blue Estate). The Guptas contend that the argument of Gandhis that there was novation of contract, is misplaced. The Guptas further contend that the parties were only negotiating about the modalities of completing the documents. That did not affect the

right of Guptas, which had already crystalised in terms of agreement for sale dated 29th February, 2000 and which agreement was still valid and subsisting. It is the case of Guptas that the termination letter issued by Gandhis has been waived by Gandhis themselves, which position can be demonstrated from the circumstances on record. It is agreed that for the nature of controversy, this is a fit case where Court Receiver ought to be appointed, as Gandhis have hastened the whole matter by executing Conveyance in favour of Blue Estate on 19th April, 2007. Accordingly, Guptas were entitled for preservation of property, which has been assured to be sold to them in terms of agreement for sale dated 29th February, 2000. According to Guptas, Blue Estate is the purchaser of the suit property with notice of the right of the Guptas thereon and will have to suffer the consequences therefor. Guptas also assert that Blue Estate, inspite of assurance given before this Court through the Counsel have committed breach of that assurance by continuing with the work on the suit property, resulting in altering the status quo of the suit property as existed on 27th April, 2007. For that reason, Blue Estate is liable to be proceeded under Order 39 Rule 2A of C.P.C.

14. In so far as Golden Acres Co-op. Housing Society Ltd., which has been arraigned as Respondent in the Notice of Motion No.1339 of 2007 taken out by Gandhis, it is fairly stated on behalf of the society that the Society was accepting that the bungalow/structure on Plot No.1 is not owned by the Society. But, it is asserted that the land underneath the structure belongs to the Society. It is their case that the suit plot forms part of larger property-A, which is required to be conveyed to the Society by M/s. S.M.Builders, who had divided the same into Property-B and Property-C to construct two bungalow type colonies on ownership basis. The purchasers of the plots in the said scheme in turn were to become members of the Society, which admittedly is a Tenant Co-partnership Housing Society. According to the Society, neither Mira Janak Trust (predecessor of Gandhis) nor Gandhis themselves could claim any right or ownership with regard to the land. That was to be the property of the Society. Gandhis would at best continue to remain as members of the Society having been allotted plot No.1 to be enjoyed, subject to the by-laws and regulations of the Society. In other words, Gandhis were not the absolute owners of the Plot No.1, admeasuring 1000 sq. yards, on which Bungalow No.18

known as "Gurukripa" is situated. The Society even during argument made it clear that although the land belongs to Society, Society was not claiming possession of the land as such for the present, nor claiming any right in the bungalow. However, it is asserted on behalf of the Society that the transaction between the Gandhis and Guptas was already subject matter of challenge in the dispute filed by the Society before the Co-operative Court. In short, the case of the Society is that Gandhis cannot create third party right in the suit property, in particular, Plot No.1 admeasuring 1000 sq. yards without the consent of the Society, who in fact is the owner and entitled for conveyance of the larger property being Property-A, which includes suit property Plot No.1(part of property-C). To consummate the Consent Terms between Society and S.M.Builders entered upon in the proceedings between them, the Society was entitled for conveyance of the entire property(larger plot of land comprising of Plot Nos. 1 to 17) from M/s. S.M.Builders. According to the Society, in fact, Gandhis Suit is not maintainable. That is so because on their own assertion, Gandhis admit that they have already conveyed the suit property to third party. If so, in terms of Section 34 of the Specific Relief Act,

Gandhis have no legal right to pursue any claim in respect of suit property. Besides, it is argued that the plaint of Gandhis has been drafted with dexterity. If closely examined, it would appear that none of the Defendants in the Suit filed by the Gandhis were denying their right or interest in the suit property. It is only the Society, who could have asserted to the contrary. But, the Society has not been made party to the Suit filed by Gandhis with purpose. Gandhis have filed such Suit deliberately to keep away the Society and to secure orders from the Court, thereby directly affecting the right of the Society. The Society has not been made party in the main Suit inspite of the nature of controversy involved and the stand of the Society. The Society is not only a proper party but atleast a necessary party to the suit for the nature of relief claimed by Gandhis in their Suit. The Suit by Gandhis therefore, suffers from non-joinder of necessary and proper parties. The Society asserts that Gandhis cannot claim higher right than what has come to them through their predecessor Mira Janak Trust. The fact that there is registered Conveyance in favour of the Gandhis and also Index-II entry showing Gandhis as owner of Plot No.1, does not make them owners of the said property. The fact that Gandhis have admitted

that they have become members of the Society clearly recognises the limited right, which has enured to them from their predecessor Mira Janak Trust. The registered conveyance by itself cannot create clear and absolute title in respect of the land being Plot No.1, admeasuring 1000 sq. yards, which in fact belongs to the Society. According to the Society, it is too late in the day for the Gandhis to contend that they could have transferred Plot No.1 or created any right therein without prior permission of the Society. Gandhis are bound by the by-laws and regulations of the Society, of which they are the members. According to the Society, Gandhis have not chosen to challenge the validity of the General Body resolution passed by the Society on 20th May, 2001. In view of the said resolution, present Suit would be barred by limitation. Having realised all these difficulties, perhaps, Gandhis consciously avoided impleading Society as party Defendant in the present suit. In substance, for the time being, the Society contends that any order, to be passed by this Court should not affect the right of the Society to proceed with the conveyance of the larger plot of land comprising Plot Nos. 1 to 17 in terms of the Consent Terms and the assurance already given by M/s.S.M.Builders in the proceedings between the

Society and M/s.S.M.Builders.

15. Having gone through the pleadings and documents on record with the assistance of the Counsel appearing for the respective parties and keeping in mind the rival submissions, the first question that I propose to address is to trace the title of the suit property. It is not in dispute that the larger plot of land comprising of Plot Nos.1 to 17 formed part of Ruia Park Estate, Juhu, Mumbai (property-A). The same was originally owned and possessed by M/s. Ramnarain Sons Private Limited. The property-A was acquired by M/s. S.M.Builders from M/s. Ramnarain Sons Private Ltd.. Thereafter, S.M.Builders divided the property-A into property-B and property-C to construct two bungalow type colonies on ownership basis. Property-B comprises "Golden Beach Bungalow Scheme", whereas Property-C comprises "Golden Acres Bungalow Scheme". The suit property Plot No.1 is a part of property-C. There is absolutely no contest in respect of this factual position.

16. It is also not in dispute that the suit property was sold by M/s. S.M.Builders to Mira Janak Trust. Neither party has produced any formal

agreement in that behalf. However, what has come on record is only a letter dated 27th November, 1975 issued on the letter head of M/s. S.M.Builders signed by one of its partner K.V.Satyamurty, addressed to Mira Janak Trust. The Society has produced this letter at Sr.No.1 of its compilation. The letter is addressed to Mira Janak Trust. Gandhis however, produced Xerox copy of the same letter, which shows that the name Mira Janak Trust has been scored off and instead names of Janak Patel HUF and Mrs.Mira B. Patel is written by hand. At this stage, it is not necessary for this Court to examine the reason for such discrepancy. What is relevant for our purpose is the terms set out in this letter, on the basis of which the suit property was transferred in favour of Mira Janak Trust by S.M.Builders. I think it apposite to reproduce the entire text of the said letter.

> "Dear Sirs,
>
> Re: Plot No.1 in Golden Acres Bungalows Scheme, Ruia Park, Juhu, Bombay-400054.
>
> This is confirm and record that in consideration of your having paid from time to time a total sum of Rs.2,00,000/- (Rupees Two Lack only) being your share of the total cost of the land bearing Survey No.44 and situated at Mouja, Juhu, Ruia Park, Bombay. You have been allotted Plot No.1 as shown boundary ABCD in red boundary line in the layout plan annexed,

hereto and demarcated on the ground at site for the purpose of constructing your Bungalow therein.

You shall carry out the construction of your bungalow entirely at your own cost as per the plans prepared by your Architect and through your own contractors within 35′ height restriction and as per prevalent regulations.

It is understood that, the aforesaid plot forms undivided part of the larger holding and the bungalow constructed by you therein shall form part of the scheme known as Golden Beach and Golden Acres Bungalows Scheme.

The title to the said property is clear and marketable and stands in the name of Ruia's principal Concern M/s. Ramnarain Sons Pvt.Ltd. To avoid any legal problems vis-a-vis URBAN Land Ceiling Bill & URBAN Land Alienation Bill we are having the Concept of Joint Venture Agreement in our Scheme. A subsidiary Company of Ruias has been formed of which all Bungalows Owners shall be Share-holders and the plots will be transferred to the Subsidiary Company very soon.

You shall become a member of the Private Limited Company or a Co-operative society as the case may be formed by the Bungalow holders.

You will pay your proportionate share of property taxes, water charges, electricity charges, and pay for common amenities like drainage, electricity charges, and pay for common amenities like drainage, electricity and water facilities on pro-rata basis. When you get direct connection for water and electricity you may pay directly to the authorities concerned.

We welcome you to our scheme.

Thanking you." (emphasis supplied)

Even if this letter is treated as agreement between M/s.S.M.Builders and Mira Janak Trust for transfer of Plot No.1, i.e. the suit property, it is amply clear that the suit plot formed part of undivided larger property and the bungalow to be constructed by the predecessor of Gandhis thereon was to form part of the scheme known as "Golden Acres Bungalow Scheme". It was clearly understood that the subsidiary company of Ruias was to be formed, of which all bungalow owners were to become shareholders and the plot would be transferred to the subsidiary company. The letter also records that the purchasers shall become members of the Private Limited company or Cooperative Society, as the case may be, formed by the bungalow holders. In substance, it is evident that the suit property was purchased by the predecessor of Gandhis i.e. Mira Janak Trust, with clear understanding that they would become members of the Private Limited Company or Co-operative Society, to be formed by the bungalow holders and the larger property was to be conveyed to such company or Co-operative Society. In other words, limited right was created in favour of Mira Janak Trust in relation to the suit property. There is no record to indicate that Mira Janak Trust had become absolute owner of Plot No.1. The Society

has produced sample agreement executed between the S.M.Builders and another plot owner at Exh.2 in the compilation. Clauses-7, 8, 9, 16, 17 and 18 of the agreement almost replicates the understanding arrived at between M/s.S.M.Builders and Mira Janak Trust, predecessor of Gandhis. The same reads thus:

> "(7) It is agreed that after all bungalows on the said property as per the lay our plans attached herewith once sold out to various Acquirers and as and when the same are nearing completion and all works completed the Builders agree to transfer the property in the name of the Private Limited Company or a Co-operative Housing Society or Association of Apartment Owners and at that stage the Acquirers together with the other Acquirers of the bungalows agree to sign the required papers and documents for the above purpose.
>
> (8) The open area around the said bungalow agreed to be allotted to the Acquirers shall be kept by the Acquirers open and unbuilt in accordance with the rules and regulations of the incorporated body or other association in whose favour ultimately the conveyance in respect of the said property described in the Annexure 'A' hereunder attached shall be executed.
>
> (9) The said Bungalow agreed to be allotted to the Acquirers and the land appurtenant thereto as aforesaid shall be held by the Acquirers as per the bye-laws and rules and regulations as may from time to time to made or determined by the Company or Housing Society or Association after it is formed.
>
> (16) The Builders reserve to itself the right to be used in their absolute discretion to alter, amend, the layout and/or the Building plan in respect of any one or more of the bungalows remaining unsold and F.S.I. remaining unsold and F.S.I. remaining

unutilised by construction of flat or multistoried apartments shopping centre, bank co-operative store etc. and the Acquirers shall not be entitled to object to amended lay-out development nor concerning to their allotments.

(17) The Acquirers shall not sell transfer let sub-let or otherwise dispose of the said bungalow or any part thereof or part with their interest under this agreement or part with possession of the said bungalow or any part thereof until all the dues payable by the Acquirers to the Builders/company/Housing Society shall have been paid and provided that the Acquirers/Purchasers shall have obtained prior written consent of the Builders/Company/ Housing Society or Association of Apartment Owners after its formation.

(18) The Acquirers hereby convenant with the Company or Housing Society and or with Acquirers of other bungalows in the said scheme in whose favour the Conveyance of the said portion of the land described in the Schedule hereunder written shall be execute as follows:-

(a) The Acquirers shall observed and perform the terms conditions and covenants herein contained and shall keep the Company or Housing Society or the Association and Acquirer of other bungalows indemnified against non-observance and/or non-performance of such terms covenants and provisions to be observed and performed by the Acquirer herein individually and/or collectively.

(b) The Acquirers shall not do or cause to be done any act or thing which may render voidable any insurance in respect of the said bungalow or any part thereof cause any increased premium to be payable in respect thereof or by the Owners of the adjoining property.

(c) The Acquirers shall not throw dirt, rubbish or other refuse or permit the same to be thrown in the common compound or any portion of the said layout except at the

> place kept and specifically reserved for that purpose." (emphasis supplied)

17. It will be reasonable to assume that Mira Janak Trust was bound by similar stipulation being one of the plot holder in the scheme. Thus understood, Mira Janak Trust inherited the limited right in respect of the suit property, on the same terms as other plot owners, as mentioned earlier. For, even if there is no written agreement in favour of Mira Janak Trust, the letter on the basis of which plot No.1 has been allotted by S.M.Builders to Mira Janak Trust virtually reiterates the same condition as made applicable to the other plot purchasers in the scheme. It is not in dispute that the Plot purchasers later on went on to form a society, namely, Golden Acres Housing Co-op. Society Ltd..

18. Be that as it may, it would necessarily follow that Gandhis would inherit the same right in respect of the suit property (Plot No.1); and the Gandhis could claim only those rights, which had vested in Mira Janak Trust(predecessor of Gandhis). The registered conveyance deed in favour of Gandhis cannot take the matter any further. It is not in dispute that Mira Janak Trust were members of the

Society and were issued five fully paid-up shares under Share Certificate No.3. As is mentioned earlier, the Society of Plot owners has been registered as Tenants Co-partnership Housing Society. The Tenants Co-partnership Housing Society is a Housing Society, which holds both land and buildings either on leasehold or free hold basis and allot them to their members. Having been admitted as members, the predecessors of Gandhis were bound by the terms and conditions of by-laws and regulations of the Society so as to deal with the Plot No.1 in any manner. For the present, there is nothing to indicate that transfer in favour of Gandhis by trustees of Mira Janak Trust under agreement dated 16th March, 1993 was after taking prior no objection certificate of the Society. What is significant to note is that Clause(v) of the agreement dated 16th March, 1993 in favour of Gandhis clearly records that S.M.Builders had addressed the letter dated 21st November, 1975, which has been treated as an agreement in favour of Mira Janak Trust in relation to the purchase of Plot No.1 in Golden Acres Bungalow Scheme at Ruia park, Juhu, Bombay 400 049. Clause-(ix) of the same agreement records that Cooperative Society known as "the Golden Acres Cooperative Housing Society Limited" was formed by

the purchasers of the Plots and/or bungalows in the said scheme and registered under the provisions of the Maharashtra Co-operative Housing Societies Act, 1960. Clause-(x) of the Agreement then records that the Society has issued five fully paid up shares in the name of the said HUF. Clause-(xi) of this agreement records that although the Society has been formed and registered, S.M.Builders have still not executed a Deed of Conveyance in favour of the Society in respect of property-A(larger plot of land) and the bungalows thereon. Clause-1-C of the Agreement provides that within four days from the date of the agreement, the Vendors(Mira Janak Trust) agree and undertake to obtain necessary No Objection letter for admitting purchasers(Gandhis) as members of the said Society and accepting transfer of the right, title and interest of the vendors in the five shares issued by the Society in the name of Vendors to the names of the purchasers upon the Purchasers agreeing to become members of the Society and abiding by the Bye-laws of the said Society. Clause-(7) of the said agreement would also throw light on the point in issue. In that, Vendors (Mira Janak Trust) have informed the purchasers(Gandhis) about certain matters. The relevant clause reads thus:

> "7. The Vendors have informed the Purchasers that (a) the Builders will not execute or cause the Owners to execute a Deed of Conveyance in respect of the said Property D in favour of the Vendors and/or the Purchasers as according to the Scheme of development originally evolved by the Builders the Deed of Conveyance will be executed by the Owners and the Builders in respect of the said Property A more particularly described in the First Schedule hereunder written and all the bungalows constructed thereon in favour of the said Society (b) the said Society may then consider granting leases in Perputuity, that is, for a period of 999 years at a nominal rent of Rs.1.00 (Rupee One only) per year in favour of each member of the Society in respect of his/her plot and bungalow, (c) no Completion Certificate has been issued by the Municipal Corporation Greater Bombay in respect of their said bungalows or any of the other bungalows constructed in the Scheme because of want of Co-operation from the Builders and that the Society is in the process of, for the past few years, in sorting out matters with the Municipal Corporation of Greater Bombay, (d) that owing to the height restrictions, the height of each bungalow in the scheme cannot exceed 35 feet;"

19. On conjoint reading of these clauses, it leaves no manner of doubt that the right transferred in favour of Gandhis in relation to the suit property-Plot No.1, was limited and not as absolute owner thereof. Gandhis in turn, admittedly, became member of the Society. As a result, Gandhis were bound by the Bye-laws and regulations of the Society. Gandhis purchased the suit property-Plot No.1 with clear understanding that the owner thereof was to be

the Society and they would remain in the plot and enjoy the plot only as a member of the Society as per the terms and conditions of the Bye-laws and regulations of the society.

20. On the other hand, Gandhis are relying on the registered Conveyance to assert that they are absolute owners of the suit property-Plot No.1 and are entitled to enjoy the same uninterruptedly, as also to enjoy unutilised FSI admeasuring 2604 sq.ft. in relation to the suit plot. Conveyance in favour of Gandhis or for that matter entry in the Index II in the relevant column in the name of Gandhis as owners of the suit property, as mentioned earlier, cannot take the matter any further nor create higher right in their favour than the one possessed by their immediate predecessor(Mira Janak Trust). To put it simply, Gandhis are not the absolute owners of the suit property-Plot No.1.

21. It is a different matter that although the Society is classified as "Tenants Co-partnership Housing Society, as a result it not only holds both lands and buildings standing on the said land, but before this Court, Society has taken the stand that it is not claiming to be the owner of the bungalow.

Even if that stand of the Society is accepted as it is, Gandhis can claim to be the absolute owners only in respect of bungalow standing on the suit property(Plot No.1). No more and no less.

22. On the above findings, it necessarily follows that Gandhis cannot be heard to interdict the process of execution of conveyance in favour of the Society to be executed by M/s.S.M.Builders in respect of the larger plot of land being property-A comprising of Plot Nos. 1 to 17, the suit property is only a part of Property-C, which is a portion of larger plot of land(property-A). From the terms recorded in the documents executed between the predecessor of Gandhis and by the Gandhis inter se, it is amply clear that larger plot of land will have to be conveyed to the Society and the plot owners would only remain members of that Society to enjoy the plot allotted to them, as per the terms and conditions of the bye-laws and regulations of the Society.

23. Thus understood, Gandhis cannot succeed in interdicting the process of execution of conveyance of the larger plot-Property-A in favour of the Society to be executed by S.M.Builders, which is required to be done as per the Consent Decree passed

by the Court in the Suit filed by the Society against the S.M.Builders on 1st October, 2001 in Suit No.4655 of 1994. In fact, a solemn assurance is given by S.M. Builders before this Court in Contempt Proceedings taken out by the Society. However, before the assurance given by S.M.Builders was to be fulfilled, Gandhis rushed to this Court by way of present Suit and persuaded this Court to grant ad-interim relief on 12th April, 2007. While granting ad-interim relief, I had placed reliance essentially on Conveyance Deed dated 8th February, 1994 in favour of Gandhis, which is a registered document. Besides Conveyance deed, I have also adverted to entries in the Index-II Register as well as Property Card. On that basis, at ad-interim stage, I proceeded to observe that prima facie case was made out by Gandhis that they were owners of the suit property. However, on deeper enquiry now made after going through all the relevant records, as observed earlier, it has become more than clear that Gandhis have acquired limited right in the suit property(Plot No.1) and are not absolute owners thereof. Significantly, the Society has already filed dispute against Gandhis and their predecessors before the Cooperative Court questioning the validity of the Conveyance executed in favour of Gandhis on or

about 8th February, 1994 and 23rd June, 1994 respectively. The question whether the Cooperative Court has jurisdiction to try such dispute is already answered against Gandhis and the dispute is pending before the Co-operative Court for adjudication. The fact remains that even if Gandhis succeed before the Cooperative Court, they would have limited right in the suit property being Plot No.1, which would originate from the agreement between the S.M.Builders and Mira Janak Trust(predecessor of Gandhis). As aforesaid, it is amply clear that the understanding between S.M.Builders and the predecessor of Gandhis-Mira Janak Trust obliged Gandhis to become member of the proposed Society of the Plot owners in the bungalow scheme propounded by S.M.Builders. Further, the larger plot including suit property(Plot No.1) was to be conveyed to the proposed Society by S.M.Builders. Thus understood, by no stretch of imagination Gandhis would succeed in persuading the Court that conveyance between S.M.Builders and the Society of the larger property, which is required to be executed to consummate the Consent Decree can be interdicted at the instance of Gandhis.

24. There is force in the stand taken on behalf of the Society that the maintainability of the Suit

filed by Gandhis, in the form, it is presented, itself, is questionable. Gandhis have sought reliefs, which would directly affect the Society, of which they are members. The Society has not been made party to the Suit. It is at the insistence of the Court, Gandhis chose to make Society as Respondent only to the Notice of Motion. Gandhis can succeed in getting the reliefs, as claimed in the Suit only if the Society is before the Court. There is merit in the submission made on behalf of the Society that Gandhis have consciously chosen to implead only such parties as Defendants in the Suit, who would not oppose their claim. The real person(Society), who would oppose the claim of the Gandhis has been kept out of the Suit.

25. I find substance in the stand taken on behalf of the Society that the present Suit has been filed by Gandhis only to protract the execution of conveyance of larger plot in favour of the Society by S.M.Builders. Presumably, this suit is filed at the instance of S.M.Builders itself. For, it is too much to assume that Gandhis were unaware of the dispute filed by the Society against them or for that matter the Suit filed by the Society against the S.M.Builders. Gandhis are closely following the

proceedings filed by the Society against S.M.Builders. It is only after S.M.Builders finally made statement before this Court in Contempt action on 13th March, 2007, that Gandhis chose to file the present suit in April, 2007.

26. In the circumstances, the reliefs claimed by the Gandhis in the present Motion of restraining the Defendant-S.M.Builders in transferring, conveying, dealing with, entering upon and/or executing any deed or conveyance or any documents in respect of the suit Plot or any part thereof either pursuant to the undertaking recorded in the Order dated 13th March, 2007 or in any manner will have to be rejected.

27. In other words, besides the fact that Gandhis have failed to make out any case muchless prima facie case, even the maintainability of the Suit filed by Gandhis itself is doubtful, as the Suit is filed against the persons, through whom the Gandhis are claiming right in respect of suit property. The suit has been filed only against S.M.Builders, who are obliged to convey larger plot of land to the Society, which would include the suit property. Gandhis on the other hand, have limited right in the suit property being Plot No.1 and are bound by the

bye-laws and regulations of the Society, of which they are members.

28. There is yet another formidable plea taken on behalf of the Society about maintainability of the Suit. That is in the context of Section 33 of the Specific Relief Act. Although Gandhis have approached this Court by way of present Suit on 7th April, 2004, they now claim to have conveyed the suit property in favour of M/s. Blue Estate on 19th April, 2007. If it is so, Gandhis have no right left in the suit property after 19th April, 2007 and are not entitled to pursue the remedy. M/s. Blue Estate is not party to the suit filed by Gandhis nor has come forward to continue the action already instituted by Gandhis. Even if, Blue Estate were to come forward and get itself transposed as Plaintiffs in the Suit filed by Gandhis, going by the documents on record, as observed earlier, it is amply clear that Gandhis have limited right in Plot No.1, which is a part of the larger plot of land, which will have to be conveyed in favour of the Society by S.M.Builders and Gandhis or any person claiming through them can only remain in possession of the said plot at best as member of the Society subject to the terms and conditions of bye-laws and regulations

of the Society.

29. Taking the case of Guptas, at the outset, it needs to be mentioned that Guptas cannot claim higher right than the one possessed by Gandhis. Assuming that they were to succeed in the present action. According to the Guptas, Agreement for Sale was executed by Gandhis in their favour in respect of suit property being Plot No.1 admeasuring 1000 sq. yards with bungalow known as "Gurukripa" situated at Juhu, Mumbai alongwith unutilised FSI of 2604 sq.feet. That agreement was executed on 29th February, 2000. The core issue in the Guptas proceeding is whether the Agreement for Sale dated 29th February, 2000 is valid and subsisting. If this Court were to take the view that Guptas Agreement for Sale is terminated and not subsisting, in that case, no other argument can be of any avail to the Guptas. Assuming that this Court were to take the view that Guptas Agreement to sell was subsisting and valid, that however, would be subject to the rights of Gandhis in the suit property and not beyond.

30. I shall revert to the question whether the agreement to sell in favour of the Guptas dated 29th February, 2000 was valid and subsisting? Both sides

have relied on host of documents to buttress their stand on the point in issue. It is not necessary to burden the Judgment by adverting to the details of terms and conditions of the agreement for the time being. For, it is the case of Gandhis that the said agreement was to stand automatically terminated, having failed to complete sale within 15 days on issuance of letter. In terms of the letter dated 29th February, 2000, according to Guptas, they had already paid part consideration; and balance consideration of Rs.3,10,50,000/- was to be paid only after No Objection Certificate from the Society was obtained. It is only on receipt of intimation about issuance of No Objection Certificate, Guptas were expected to pay the balance consideration. Gandhis however, by their letter dated 3rd September, 2004 called upon the Guptas to pay the same within a period of 7 days, failing which agreement would stand automatically terminated. From the material on record, it is certain that time was made essence of the agreement dated 29th February, 2000. However, as the transaction was not completed, Gandhis called upon Guptas to complete the same within specified time in terms of their letters dated 26th February, 2004, 28th July, 2004 and again dated 3rd September, 2004. Guptas on the other hand, would contend that

the balance consideration was to be paid by them only after No Objection Certificate from the Society was obtained by Gandhis. Almost after one year Gandhis in their letter dated 20th September, 2005 terminated agreement dated 29th February, 2000. Gandhis also asserted to have returned Earnest Money of Rs.34,50,000/- together with the interest of Rs.10,44,332/-. Guptas on the other hand, proceeded to give public notice on 4th/5th October, 2005 claiming that agreement in their favour in respect of the suit property was valid, subsisting and binding. It is also common ground that later on meeting was held on 29th December, 2005, during which negotiation took place between the parties. This only shows that even though letter of termination was issued by Gandhis, that was not immediately acted upon. But parties huddled together to negotiate further. As per Gandhis, in the meeting of 22nd December, 2005, it was decided that execution of the conveyance and completion of sale would be done on 23rd January, 2006, time being essence. It was also agreed that the sale would be on "as is, where is" basis and it will be sole responsibility of Guptas to obtain permission of the Society. In the event, sale is not completed within the specified time, agreement would stand terminated. This, according to the Gandhis,

constituted novatio of the original agreement. Inasmuch as requirement of Gandhis procuring No Objection Certificate from Society was done away with and the parties agreed with the sale on "as is, where is basis". According to the Gandhis, this was a fresh term of agreement arrived at for sale of suit property in favour of Intel Developers Private Ltd. That fact is reinforced from the letter of Guptas' advocate sent to Gandhis Advocate dated 19th January, 2006, which records that the suit property will be kept in the name of Intel Land Developers Pvt.Ltd.

31. What is relevant for our purpose is to note that the parties interacted between themselves by series of letters. Guptas forwarded revised draft of the Indenture of Conveyance and further documents. According to the Guptas, Gandhis agreed to extend time for completing the sale. It appears that Gandhis' advocate wrote to Guptas' Advocate on 3rd February, 2006, mentioning that the agreement between Guptas and Gandhis has been cancelled, but just prior to the execution of the Indenture of Conveyance between Gandhis and Intel Land Developers Pvt.Ltd., Guptas should furnish letter clearly stating that they did not have any claim against Gandhis. This letter spells out atleast one position that the

parties, till issuance of this letter, were ad-idem that the suit agreement was still subsisting and binding between them. Else, the Gandhis would not have insisted for such indemnity from the Guptas.

32. There are other letters on record exchanged between the Guptas and Gandhis for furnishing certain documents, including seeking clarification in respect of certain matters. Later on, on 27th March, 2006 Gandhis' Advocate placed on record that it had been finally agreed that the sale would take place on 'as is, whereas' basis, to be completed on 30th January, 2006 and as that has not been done, agreement stood cancelled forthwith.

33. According to the Guptas, immediately on 3rd April, 2006, Gandhis were informed that they were ready and willing to perform their part of the obligation and Gandhis are not entitled to terminate the agreement or forfeit the Earnest Money and instead, called upon Gandhis to furnish documents as requisitioned. In response to this letter, on 12th April, 2006 Gandhis forwarded various documents, as had been requested by the Guptas Advocate. Followed by that letter, Gandhis advocate issued letter dated 18th April, 2006 forwarding other documents, which

were requested by the Guptas advocate. This clearly indicates that it is not the case of Gandhis that these letters were sent without prejudice. It necessarily follows that inspite of letter dated 27th March, 2006, Gandhis interacted with Guptas for completion of transaction between them on the basis of suit agreement. Guptas advocate then sent letters calling upon the Gandhis to seek permission of competent authority under ULC Act and also forwarded revised agreement, to be executed by Gandhis upon receiving such permission. According to the Guptas, on 19th May, 2006, reminder was sent to Gandhis Advocate to obtain ULC permission, followed by another reminder dated 2nd June, 2006. In response thereto, Gandhis advocate on 12th June, 2006, requested Guptas that all documents provided to them be returned. Gandhis advocate then by letter dated 21st June, 2006 informed Guptas advocate that they were unable to obtain ULC permission and negotiation for sale to Intel Developers stood cancelled forthwith. On receipt of this letter on 24th June, 2006, Guptas advocate immediately wrote to Gandhis to obtain permission from ULC authorities. On 14th December, 2006, however, Gandhis advocate informed Guptas that No Objection Certificate from ULC authorities has been obtained and also called upon

the Guptas to complete transaction by 18th December, 2006, else the agreement would automatically stand cancelled and that the earnest money together with the interest will be forfeited. Once again this letter from Gandhis indicates that the suit agreement was always treated as valid and subsisting between the parties inspite of intermittent termination letters issued by Gandhis.

34. Significantly, according to the Guptas, the fact that ULC permission was already obtained, was never informed to Guptas. As they were called upon to complete transaction within four days after 14th December, 2006, Guptas called upon the Gandhis to forward ULC order, commencement certificate and occupation certificate. Gandhis in turn forwarded copy of ULC permission dated 4th July, 2006 on 15th December, 2006 itself. Later on, Gandhis advocate forwarded copies of commencement certificate and occupation certificate on 8th July, 2006. Commencement certificate is dated 25th May, 1974. Occupation certificate is dated July, 1980. These documents were furnished to the Guptas for the first time under the cover of letter dated 18th December, 2006. Guptas accordingly, obtained pay order in favour of Gandhis. It is the case of Guptas that on

18th December, 2006, Guptas obtained pay order in favour of the Gandhis advocate of Rs.44,08,000/-. On 22nd December, 2006 Guptas obtained two pay orders in favour of Gandhis advocate of Rs.1,15,71,000/- each and forwarded the same, to be handed over to the Gandhis against receipt of the original documents of the suit property. From the above, it is obvious that Guptas were always ready and willing to perform their part of obligation.

35. Notably, Guptas advocate informed Gandhis advocate regarding the fact that pay orders have been received by him under letter dated 23rd December, 2006. Later on, Guptas advocate on 23rd January, 2007 called upon Gandhis to comply with the obligations under the agreement and to complete transaction within 15 days. Guptas also proceeded to issue public notice in local news paper on 15th February, 2007. According to the Guptas, meeting took place on 18th March, 2007 between Guptas and Gandhis, when Gandhis allegedly expressed their inability to convey the suit property on account of proceedings pending in the High Court, being Contempt Petition No.108 of 2003, wherein S.M.Builders had made statement before the Court that they would convey larger property (Property-A), which included

the suit property in favour of the Society within four weeks. In view thereof, Guptas wrote to their own advocate to hand over these pay orders lying with the advocate against which the bank fixed deposit receipt would be provided to guarantee payment to Gandhis. Guptas, in turn, invested amount in fixed deposit receipt. That position was informed to Gandhis by Guptas Advocate. Gandhis however, by advocate's letter dated 18th April, 2007 returned the earnest money of Rs.34,50,000/- together with the interest Rs.11,95,541.79 and informed that the agreement was terminated. Not only that, Gandhis proceeded to execute registered Conveyance Deed in favour of the Blue Estate Private Limited on 19th April, 2007. This transaction is effected by Gandhis after ad-interim order was passed by this Court in the Suit filed by Gandhis against S.M.Builders for relief of injunction restraining them amongst other from conveying the suit property to the Society in terms of the assurance given to this Court recorded in Order dated 13th March, 2007.

36. From all these events, it is more than clear that as recently till 14th December, 2006, Gandhis gave impression to Guptas that the Agreement for Sale executed between them was subsisting. Indeed, this

letter called upon the Guptas to complete transaction on 18th December, 2006. Guptas in turn, called upon the Gandhis to furnish certain documents and on receiving the same immediately prepared pay orders, to be paid to Gandhis on receipt of original documents from them. Original documents were never made over to Guptas or their advocates by Gandhis. No response was given by Gandhis to letters sent by Guptas advocate thereafter and straightaway earnest money amount came to be returned by Gandhis on 18th April, 2007. More importantly, immediately on the next date, Gandhis proceeded to execute registered Conveyance in favour of Blue Estate. This conduct of Gandhis clearly establishes that they wanted to make the matter fate accompli for the Guptas. On the other hand, from the record, for the purpose of considering prayer for interim relief, prima facie case has been made out by Guptas that the suit agreement was valid and subsisting and that they were always ready and willing to perform their part of the contract. Thus understood, Guptas are entitled for preservation of property till hearing of the Suit.

37. The next question is whether the prayer for appointment of Court Receiver, as prayed by Guptas should be accepted. In my opinion, merely because

this Court has found that Gandhis have hastened the matter presumably with a view to defeat the claim of Guptas, that by itself cannot be the basis to appoint Court Receiver. For, if the property is ordered to be preserved and status quo maintained, that would secure the interest of Guptas. The necessity of requiring the property to be preserved is also on account of the fact that Gandhis or any person claiming through them have limited right in the suit property. As has been found earlier, Gandhis or any person claiming through Gandhis cannot claim any higher right than the one possessed by Gandhis and their predecessor.

38. Here, I may add that preservation of property will not preclude the Society from proceeding with the execution of the Conveyance in terms of the Consent Decree operating between Society and S.M.Builders and in particular, the assurance given by S.M.Builders before this Court in the Contempt Petition on 13th March, 2007.

39. That takes me to the question whether Blue Estate, who is presently in possession of the suit property has committed breach of the statement made on its behalf, as recorded in order dated 27th April,

2007? To consider this submission, it is necessary to advert to prayer clause (b) of the Notice of Motion No.2005 of 2007. The same is already extracted in the earlier part of this Order. By that relief Guptas have had prayed for ad-interim relief against the Defendants in their Suit (including Blue Estate) for restraining them from selling, alienating, encumbering, transferring, developing, creating third party right in respect of or part with possession of the suit property described in Schedule-A to the plaint.

40. I find substance in the submission made on behalf of the Blue Estate that it is in the context of the said relief, assurance was given on behalf of the Blue Estate through Counsel to this Court on 27th April, 2007. Even if the case made out by the Gupta against Blue Estate were to be accepted as it is, it is not a case of selling, alienating, encumbering, transferring or creating third party rights in respect of or part with possession of the suit property as such. At best, it may attract the term "developing" occurring in the prayer clause (b) of the Motion. The acts of commission and omission of Blue Estate are stated to be that, inspite of statement given before this Court on 27th April,

2007, Blue Estate continued to do construction work on the suit property. Blue Estate on the other hand, countered the allegations of Guptas and have categorically asserted that the work, which was continued on the suit property was only of repairs and renovation of the existing building. The stand taken by Blue Estate is in fact, reinforced from the report of the Commissioner. The photographs produced before the Court would also persuade me to accept the claim of Blue Estate that the work, which has been carried on in the suit property after 27th April, 2007 was one of repairs and renovation of the existing structure. If it is so, on this finding, it necessarily follows that no breach has been committed by Blue Estate. For, they did not indulge in "developing" the suit property as such. Understood thus, there is no merit in the grievance made on behalf of the Guptas that Blue Estate committed breach of the assurance given before this Court on 27th April, 2007 in any manner. Accordingly, Motion taken out by Guptas being Notice of Motion No.2311 of 2007 will have to be rejected being devoid of merits.

41. In so far as prayer clause(c) of Guptas Motion being Notice of Motion No.2005 of 2007 is concerned, that relief is already worked out. This

is so because the documents and pleadings on record would clearly establish that the Defendant No.5 Blue Estate has already been handed over possession of the suit property by Gandhis.

42. In view of the opinion recorded while dealing with the abovesaid Notice of Motion No.2311 of 2007, nothing would survive for consideration in Notice of Motion No.3061 of 2006 taken out by Blue Estate for clarification and/ or alteration of the order of status quo granted on 27th April, 2007 and 1st June, 2007-except to observe that Blue Estate is free to carry out suitable tenantable repairs, renovation and decoration in the bungalow namely ‘Gurukripa’ in the suit property. That may be done entirely at the costs and risk of the said Defendant-Blue Estate. They shall not claim any equity at a later point of time nor ask for reimbursement of the expenses, so incurred. Counsel appearing for Blue Estate on instructions assures the Court that Blue Estate-Defendant No.5 shall not change the original structure of the suit property except to carry out repairs, renovation and decoration or create third party rights or interest therein in any manner during the pendency of this Suit. The Blue Estate also assure not to claim equity at a later point of time

in respect of any expenses incurred for improvisation of the bungalow for beneficial enjoyment. The assurance so given is accepted.

43. Accordingly, by this common order, all the four Motions are being disposed of on the following terms:

(I) Notice of **Motion No.1339 of 2007** filed by Gandhis to restrain S.M.Builders from conveying Plot No.1 to Society is **rejected** with costs in cause. As a result, the Defendant-S.M.Builders will be free to execute the Conveyance Deed in favour of the Society to consummate the Consent Decree and fulfill the assurance given to this Court in contempt proceedings.

(II) Notice of **Motion No.2005 of 2007**

(i) Prayer **clause (a)** of the Notice of Motion No.2005 of 2007 taken out by Guptas for appointment of Court Receiver in respect of the suit property is **rejected.**

(ii) Notice of **Motion No.2005 of 2007** taken out by Guptas is **made absolute** in terms of prayer **clause (b),** while making it clear that Blue Estate would be free to possess and enjoy bungalow No.18, for which purpose entitled to carry out repairs, renovation and decoration without altering original structure in any manner. The expenditure for the specified work referred to above shall be incurred by the Blue Estate at its risk and costs without claiming any equity at a later stage.

(iii) The relief in terms of prayer **clause (c)** of Notice of **Motion No.2005 of 2007 is already worked out**, as it is common ground that Defendant No.5 Blue Estate has already been put in possession of the suit property.

(III) Notice of **Motion No.2311 of 2007** taken out by Guptas for initiating action against Defendant No.5 Blue Estate under

Order 39 Rule 2A of C.P.C is **dismissed** with no order as to costs.

(IV) Notice of **Motion No.3061 of 2007** taken out by Defendant No.5 Blue Estate is **disposed of** while making it clear that they shall carry out only tenantable repairs, renovation in bungalow ‘Gurukripa’ in the suit property and shall not create any third party right, interest in the bungalow or any other portion of the suit property.

Ordered accordingly.

(A.M.KHANWILKAR,J)